Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JACK B. BUSTER and A. LEE PETERSEN

Petitioners,

v.

RONALD E. GREISEN, HENRY P. HEAD and DAVID L. RATCHYE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

1. May a district court, in a case over which it lacks jurisdiction, sanction a party and his attorney for there conduct in a state court?

2. May a court of appeals affirm an imposition of sanctions on the basis of conduct which was not mentioned in the district court?

3. May a party who is represented by counsel be sanctioned by a district court, which lacks jurisdiction, for filing a "frivolous complaint in a state court?

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I. PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals filed March 26, 1997, rehearing of the amended judgment denied May 14, 1997, Case Nos. 95-36265 and 96-35264,[1] reprinted in the Appendix hereto, in order to review whether a federal district court, which lacks jurisdiction of the case, may sanction a party and his attorney for filing a "frivolous complaint" in a state court, and whether a court of appeals may uphold such sanctions on a basis not mentioned in the district court proceeding.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is being

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[1]The unamended opinion appears at 104 F.3d 1186.

timely filed in accordance with Rule 13.1 of this court.

III. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant portions of constitutional provisions, statutes and rules pertaining to this petition are as follows:

Fifth Amendment to U.S. Constitution

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . ..

Tenth Amendment to U.S. Constitution

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

28 U.S.C § 2072

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, ...

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

. . . .

Fed. R. Civ. P. 11

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension or modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other

factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed or presented to the court unless, within 21 days after service of the

motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. . . .

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for violation of subdivision (b)(2). . . .

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of

rule and explain the basis of the sanction imposed.

IV. STATEMENT OF THE CASE

In January, 1993, Law Offices of A. Lee Petersen, P.C. was engaged to represent Jack B. Buster in the appeal of a judgment against him in Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114 (9th Cir. 1994), rehearing en banc denied, cert. denied, 115 S.Ct. 935 (1994). A majority of the panel which heard the case affirmed the judgment. (ER 75 - Affidavit, pp. 1-2).[2]

In that case, Buster was held to be a fiduciary to an ERISA plan (referred to as the "Trust"). Consequently, all transactions with him in which the Trust purchased from him promissory notes secured by real estate deeds of trust were

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[2]"ER" refers to the Excerpt of the Record filed with the Court of Appeals.

prohibited transactions under 29 U.S.C. §1106, because, as a fiduciary, Buster was a "party in interest." That statutory section was incorporated into the trust instrument, but that instrument was never disclosed to Buster until the case was being litigated. However, the trustees had possession of the trust instrument, so, in Buster's view, they should have been at least equally liable to the Trust with him for breaches of their fiduciary duties in causing the Trust to engage in prohibited transactions. (ER 75 - Affidavit, p. 4). ERISA, in 29 U.S.C. §1109, establishes remedies for the benefit of the plan, but not for the fiduciaries to the plan against each other, so Buster could not hold his co-fiduciaries accountable in the federal action. Call v. Sumatomo Bank of California, 881 F.2d 626, 631 (9th Cir.

1989). Buster considered that he had dealt with the Trust on an arm's length basis, because he did not hold himself out as an investment advisor and he did not attempt to earn any money giving investment advice. If anyone had asked Buster for investment advice, he would have refused to give it and if they had offered him compensation for investment advice, he would not have accepted it. (ER 32 - Buster Affidavit, pp. 6-7). It did not occur to Buster that he could be considered an investment advisor or a fiduciary to the Trust because he was not told what funds the Trust had available to invest, what its investments were or its investment goals, and he was not shown the trust instrument relating to its functions. (ER 32 - Buster Affidavit, pp. 5-8).

Buster concluded that he had been deceived into dealing with the Trust on the

basis of being a fiduciary due to the failure of the persons named as defendants in this case to disclose to him factual information which would have enabled him to make a correct assessment of his position and to refrain from dealing with the Trust. (ER 32 - Buster Affidavit, pp. 8-9; ER 75 - Petersen Affidavit, pp. 8-9). As a result, Buster discussed with Petersen, over a period of several months, the deception which had been perpetrated and requested representation in a lawsuit to collect compensation for the damages which resulted from the deceptive failure to disclose facts which were important to Buster in the transactions. (ER 75 - Petersen Affidavit, pp. 8-9). The lawsuit was not filed to retaliate against the Trust; the Trust was not made a party. The lawsuit was filed to recover pecuniary damages for the torts

committed by the named defendants against Buster. (ER 75 - Petersen Affidavit, p. 9). After careful consideration and research, Petersen agreed to represent Buster in the proposed lawsuit. (ER 75 - Petersen Affidavit, p. 10).

The Complaint and Amended Complaint, alleging a cause of action for deceitful failure to disclose information the defendants had a duty to disclose, a tort recognized under Alaska law, were filed in the Superior Court for the State of Alaska (ER 1; ER 4 - Amended Complaint). The defendants removed the case to the United States District Court and the District Court denied a motion to remand to the state court (ER 7; ER 13).

Thereafter,the District Court granted the defendants' motion for summary judgment (ER 66) on the basis that Buster's claims

should have been a counterclaim in the prior litigation, thereby precluding litigation of issues which were or should have been litigated and, by restating the allegations of the complaint, the district court concluded that Buster's allegations did not state the tort as recognized in Alaska Supreme Court decisions and the Restatement (Second) of Torts. Judgment was entered in favor of the defendants (ER 67).

After that, the defendants filed a motion for attorneys fees asking that judgment for their full attorneys fees be entered against Buster and his attorney (ER 72). The motion was opposed (ER 75), but the District Court, by order dated February 21, 1996, granted the motion, awarding full attorneys fees to the defendants to be paid by Buster and his attorney (ER 78). Judgment was entered jointly and severally

against Buster and Petersen in the amount of $29,244 on February 22, 1996 (ER 79).

The Court of Appeals recognized that "Buster's complaint asserts only a claim for state law misrepresentation by nondisclosure." See, Appendix, pp. 8-11. The opinion then holds that the ERISA statute, 29 U.S.C. §§ 1109 and 1132(a), affords no jurisdiction of the federal court to litigate Buster's state law claim. The opinion then, inconsistently, holds that the claim is res judicata because it was previously litigated in the district court. See, Appendix, pp.13-14. But for precisely the reason that the district court had no jurisdiction, there was no opportunity for the claim Buster presented in this case to be litigated in the previous case. Under Alaska law issue preclusion applies only to issues which were or could have been

litigated previously. State v. Smith, 720 P.2d 40, 41 (Alaska 1986). Issue preclusion does not apply, because the parties were not the same. The prior case was between Buster and a trust entity. This case is between Buster and three individuals, who had no privity of interest in the trust's claim against Buster. The issue in the prior case was the trust's claim that Buster had breached fiduciary duties. The issue in this case is Buster's claim that three individuals deceived him by failing to make disclosures of facts they had a duty to disclose.

Only by disregarding the allegations of the complaint and restating them in ludicrous terms was the district court able to render them frivolous. But the Court of Appeals, in upholding the sanctions, held that it was well within the district court's

discretion to do that.

V. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

A. The Imposition of Sanctions in This Case is Unprecedented

Until this case, it has been settled law that a federal district court cannot impose sanctions for the filing of a complaint in a state court. If the case is removed to the federal court, any sanctions imposed can be only for conduct in the district court. In Hurd v. Ralphs Grocery Company, 824 F.2d 806, 808 (9th Cir. 1987), it was held that sanctions cannot be imposed under Rule 11 for filing a paper in state court. (Removal jurisdiction was not contested, so apparently it existed. In this case, removal jurisdiction did not exist, so the case should have been remanded to the state court without any consideration of sanctions, except for the wrongful

removal.) The reasons cited for the holding in Hurd included that such imposition of sanctions would encourage removal and defeat the purpose of keeping frivolous litigation out of the federal courts, the district court had no authority to give Rule 11 retrospective application, doing so would be analogous to applying an ex post facto law and Rule 11 does not purport to authorize sanctions for actions taken in state courts. See, also, West Lake Property Owners Association v. City of Thousand Oaks, 915 F.2d 1301, 1304 (9th Cir. 1990).

Other circuits appear to have held unanimously that a district court cannot impose sanctions for conduct that occurred before removal. Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987); Foval v.

First National Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988); In Re Summers, 863 F.2d 20, 21-22 (6th Cir. 1988); Worthington v. Wilson, 8 F.3d 1253, 1257-58 (7th Cir. 1993); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990).

B. The Sanctions Were Imposed for Conduct in the State Court

The complaint and amended complaint in this case were filed in the state court. (ER 1). The sanction imposed, as stated by the district court, was for filing a complaint to bring "this patently frivolous case, in bad faith, solely for purposes of harassment." See, Appendix, p. 22. The defendants asked for "an award of full attorneys' fees" and the court awarded full attorneys' fees. The defendants urged that "(s)uch an award is justified because this lawsuit was brought in bad faith for an

improper purpose... ." (ER 72--Memorandum, p.2). They did not ask for sanctions on any basis other than the filing of the lawsuit. That was the understanding of Buster and Petersen (ER 75, p.9) ("The defendants appear not to have suggested a violation of Rule 11 in this case as to any paper but the Complaint.") and that was all they defended. Thus, all parties involved, the defendants, the court and Buster and Petersen, understood that the sanctions were imposed for filing the complaint, and nothing else. No sanction was requested for any conduct that occurred in the district court.

This Court has pointed out that the Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Court to prescribe rules of practice and procedure for the federal courts. "The Court has no authority to enact rules that 'abridge, enlarge or modify

any substantive right.'" Cooter & Gell v. Hartmarx Corporation, 496 U.S. 384, 391, 110 S.Ct. 2447, 2453, 110 L.Ed.2d 359 (1990). The Federal Rules of Civil Procedure are to govern procedure "in the United States District Courts." Ibid. Rule 11 is to deter baseless filings "in district court." 496 U.S. at 393, 110 S.Ct. at 2454. "Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of the district court proceedings." 496 U.S. at 406, 110 S.Ct. at 2461. The filings of the complaint and the amended complaint in this case were outside the context of the district court proceedings.

The Supreme Court reiterated the same principles in Willy v. Coastal Corporation, 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d

280 (1992), and pointed out that the judicial power of the United States as described in Article III of the Constitution cannot be extended by rule. Willy, 503 U.S. at 135, 112 S.Ct. at 1079. In that case sanctions imposed for creating a blur of absolute confusion by filing mountainous piles of unorganized documents and citing to nonexistent rules of law, Willy v. Coastal Corporation, 855 F.2d 1160, 1172 (5th Cir. 1988), while the case was in district court were upheld by the Supreme Court even though the Court of Appeals directed remand of the case to the state court. The Supreme Court pointed out that the sanctions were imposed for conduct in the district court and "did not signify a district court's assessment of the legal merits of the complaint." Willy, 503 U.S. at 138,112 S.Ct. at 1080.

In this case, there was no application

for sanctions until after the district court had decided the case on the merits, even though it had no jurisdiction to do so. The sanctions were imposed after and because of the district court's legal assessment of the merits of the complaint, contrary to the holding by this Court in Willy. The Court of Appeals" opinion is thus in conflict with Willy.

Federal courts, which are courts of limited jurisdiction, not only may not decide cases over which they lack statutory jurisdiction, they may not even "entertain" such cases. C. Wright, A. Miller & E. Cooper, 13 Federal Practice and Procedure, § 3522, at 62. It is not merely wrong but an unconstitutional invasion of powers reserved to the states to do so. Ibid. Consequently, a federal court has no way to know whether or not a complaint filed in a

state court and over which the federal court lacks jurisdiction is frivolous. To make such an assessment is a usurpation of power reserved to the states by the Tenth Amendment to the Constitution.

C. Amended Rule 11 Does Not Change Substantive Rights

As previously noted, retrospective application of Rule 11 to papers filed in a state court before removal is analogous to applying an ex post facto law. Hurd v. Ralphs Grocery Co., 824 F.2d at 808. It imposes punishment for an act which was not punishable when done. There is a substantive right not to be punished retrospectively for prior conduct. The courts have no authority to enact rules that abridge, enlarge or modify any substantive right. Rules can govern proceedings only "after" removal. Willy, 503 U.S. at 134,

112 S.Ct. at 1079. In this case, not only was the complaint filed in the state court, it was not advocated until after the motion for remand and motion for reconsideration had been denied, erroneously. Sanctions should noc be applied retrospectively to motions to remand which were well taken and did not violate any rule of the court and pleadings filed in the state court. Parties and attorneys have a substantive right not to be punished harshly for conduct which does not violate any rule of the federal court. Any amendment to Rule 11 allowing any such punishment would violate Article III of the Constitution, as discussed by the Supreme Court in Willy, 503 U.S. at 134, 112 S.Ct. at 1079. It would also usurp powers reserved to the states in the Tenth Amendment. This appears to be recognized in the Advisory Notes to subsection (b) of Rule

11 noting that the rule applies only to "papers filed with or submitted to the court." The note continues that obligations are not measured solely as of the time papers are filed with or submitted to the court but also for reaffirming and advocating positions taken in "those pleadings and motions after learning that they cease to have any merit." There is no suggestion that the court is authorized to reach back into the state court and impose sanctions on a party or attorney who never submitted those papers to the federal court and who are only in the court involuntarily and due to erroneous removal. It has been recognized that different standards may apply to parties and attorneys for being in a forum which they did not choose. Barrett v. Tallon, 30 F.3d 1296, 1302 (10th Cir. 1994). This principle should be even more

applicable when they are dragged wrongfully into a forum which has no jurisdiction.

D. The Sanctions Were Imposed Without Due Process of Law

Buster and Petersen have repeatedly asserted that they were denied due process of law with respect to the sanction. Rule 11, as amended, prescribes a procedure which is intended to comply with procedural due process. In subsection (c)(1), the rule requires that a motion for sanctions "describe the specific conduct alleged to violate subsection (b)." The motion filed in this case describes no conduct at all (ER 72). The motion refers to a memorandum which also is not very specific. Its most specific statement is "this lawsuit was brought in bad faith for an improper purpose and the issues involved had previously been adjudicated" (ER 72-memorandum at 2). There

was no other effort to comply with the notice requirement of subsection (c)(1) (A). Buster and Petersen concluded, "The defendants appear not to have suggested a violation of Rule 11 in this case as to any paper but the Complaint" (ER 75 at 9), and they defended on that basis. There was no specific notice that the filing of or defending a motion for summary judgment was "conduct alleged to violate subdivision (b)." Consequently, the most fundamental requisites of due process of law, notice and opportunity to be heard at a meaningful time and in a meaningful manner, were lacking. United States v. Alter, 482 F.2d 1016, 1024 (9th Cir. 1973). A hearing cannot be meaningful to a party who has not been given a reasonably adequate notice as to what the hearing is about. For this reason, a complaint in a civil matter, in order to

state a claim upon which relief can be granted, must give fair and adequate notice of each claim. No judgment is to be granted as to claims without notice and an opportunity to defend.

The only notice in this case of the application for sanctions was a motion and memorandum. The only defense was to the claims made in the motion and memorandum. The defendants asked for sanctions only on the basis of the filing of a lawsuit which they viewed as being brought in bad faith and for an improper purpose. The imposition of sanctions for any conduct except the filing of the complaint is a denial of due process of law. The imposition of retroactive sanctions for filing a motion for summary judgment was first suggested in the opinion of the Court of Appeals. There was no notice and no opportunity to defend

that proposition in the district court.

E. The Sanctions Do Not Comply With Rule 11

Under Fed. R. Civ. P. 11(c), a sanction award must be "appropriate." It may include requiring the sanctioned party to pay "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."

The sanctions imposed in this case include the attorney's fees and expenses incurred in wrongfully removing the case to federal court and in defending the motion to remand and the motion to reconsider the district court's erroneous order denying the motion to remand. To impose those expenses on Buster and Petersen is not appropriate. The expenses are not reasonable, because they never should have been incurred. The expenses were not incurred as a direct

result of Buster later filing a motion for partial summary judgment; they were incurred because the defendants' attorneys made a very obvious error of law, and persisted in it. It is not appropriate or reasonable to require Buster and Petersen to pay for other people's unforeseeable and obvious mistakes. It is much more appropriate and reasonable to award Buster his attorney's fees for obtaining a remand to state court, as allowed by 28 U.S.C. § 1447(c).

If the sanctions are sustained on any basis other than the filing of the complaint, then it must be determined what expenses and fees were incurred "as a direct result" of such other filing. No such determination has been made.

F. No Sanctions Should Be Imposed on Buster

Rule 11(c)(2)(A) proscribes the imposition of sanctions for filing a frivolous complaint against a party represented by counsel. And a complaint which is not frivolous cannot be filed for an improper purpose. Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990). Thus, if the complaint was frivolous, it could not be a basis for sanctioning Buster. If it was not frivolous, it could not have been filed for an improper purpose, so Buster could not be sanctioned for that reason.

VI. CONCLUSION

This case involves an issue of first impression which goes beyond is much more important than the issues considered by this court in Cooter & Gell v. Hartmarx

Corporation, supra, and Willy v. Coastal Corporation, supra; i.e., whether the amendments to Rule 11 in 1993 resulted in changes in substantive law which allow federal courts to impose sanctions for conduct which occurred in a state court? The opinion of the Court of Appeals in this case is a departure from principles of law which previously were settled in all of the circuits. For this and other reasons, this Court should exercise its supervisory powers to ensure that this unique case does not become a bad precedent for future cases.

This Court is urged to grant the writ and, upon hearing the case, to reverse the decisions of the Court of Appeals and the District Court.

Respectfully submitted the 6 day of August, 1997.

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A P P E N D I X

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK B. BUSTER,	)	
	)	Nos. 95-36265
Plaintiff-Apellant,	)	96-35264
	)	
A. LEE PETERSEN,	)	D.C. No. CV-94-00475-JKS
	)	
Apellant,	)	
	)	
v.	)	
	)	
RONALD E. GREISEN; HENRY P. HEAD; DAVID L. RATCHYE,	)	**ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**
Defendants-Apellees.	)	
	)	

Before: WRIGHT, BRUNETTI AND O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. Ap. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK B. BUSTER, *Plaintiffs-Appellant,*	)	Nos. 95-36265 96-35264
A. LEE PETERSEN, *Appellant,*	)	D.C. No CV-94-00475- JKS
v.	)	
RONALD E. GREISEN; HENRY P. HEAD; and DAVID L. RATCHYE, *Defendants-Appellees.*	)	ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND OPINION

Appeals from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
November 4, 1996-Seattle, Washington

Filed January 16, 1997

Amended March 26, 1997

Before: Eugene A. Wright, Melvin Brunetti and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

ORDER

The opinion filed on January 16, 1997 is amended as follows:

Slip opinion, page 469, 2nd line from the top, at the end of the sentence which concludes, "survives our jurisdictional ruling." add a new footnote, to read:

> 5 Buster contends that the district court erred by including in the sanction award fees and expenses incurred in pursuing the motion. We disagree. Although he states correctly the law prior to the 199.1 amendments to Rule 11. *see Pan-Pacific v. Pacific Union*, 987 F.2d 594, 597 (9th Cir. 1993), he ignores' the Rule's plain text, which now provides that "the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Fed.R.Civ.P. 11(c)(1)(A).

Renumber subsequent footnote.

The petition for rehearing has been considered and is **DENIED**.

OPINION

WRIGHT, Circuit Judge:

Appellant Jack Buster initiated this state law misrepresentation action in Alaska Superior Court. Asserting that the suit was an impermissible collateral attack on a prior federal judgment, Appellees Ronald Greisen, Henry Head and David Ratchye removed the case to federal district court, which granted their motions for summary judgment and sanctions. Buster challenges the district court's exercise of subject matter jurisdiction, grant of summary judgment and, with his attorney, A. Lee Petersen, the imposition of sanctions. We have jurisdiction under 28 U.S.C. 5 1291. We vacate the judgment for want of jurisdiction and affirm the award of sanctions.[1]

BACKGROUND

Greisen. Head and Ratchye were trustees of the Thomas, Head & Greisen Employees Trust, an employee trust fund subject to the Employee Retirement Income Security Act. 29 U.S.C. §§ 1001

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[1] Because we conclude that the district court lacked jurisdiction, we do not review the grant of summary judgment.

et. seq. In 1986 the Trust purchased deeds of trust secured by real property from Northern Financial, a general partnership comprised of Jack Buster and Terry Parks.

In 1989 the Trust sued Buster, Parks and Northern Financial, alleging that they had made material misrepresentations in the sale of three notes and claiming breach of fiduciary duty under ERISA. The district court ruled that Northern, Buster and Parks were fiduciaries to the Trust and that they had breached their fiduciary duty. The court awarded damages to the Trust in excess of $142,000, and we affirmed. *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 935 (1995).[2]

Buster then instituted this suit in Alaska Superior Court, alleging that the Trustees had failed to disclose information that would have put him on notice that he was a fiduciary to the Trust.

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[2] We recently affirmed a judgment in proceedings related to the Trust's efforts to execute on its judgment in the prior case. *Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449 (9th Cir. 1996). Specifically we upheld the exercise of jurisdiction over the recipient of an alleged fraudulent conveyance by Buster, and affirmed the court's finding of contempt, entry of default and default judgment against Buster.

Contending that either ERISA's "complete preemption" doctrine or the district court's "ancillary jurisdiction" conferred federal question jurisdiction over Buster's complaint under 28 U.S.C. § 1331, the Trustees removed the case to federal court under 28 U.S.C. § 1441. After denying Buster's motion to remand, the court granted the Trustees' motions for summary judgment and sanctions.

DISCUSSION

A. Subject Matter Jurisdiction

We review de novo questions of federal subject matter jurisdiction. Kruse v. State of Hawaii, 68 F.3d 331, 333 (9th Cir. 1995).

1. Complete Preemption

[1] "[A] cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Felton v. Unisource Corp.*, 940 F.2d 503, 506 (9th Cir. 1991). A corollary to this requirement provides "that Congress may so

completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Taylor*, 481 U.S. at 63-64; *Felton*. 940 F.2d at 507. ERISA "completely preempts" a state law claim only when it both preempts the claim under 29 U.S.C. § 1144(a) and displaces the claim with its civil enforcement provision, 29 U.S.C. § 1132(a). *Taylor*, 481 U.S. at 66; *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994). The Trustees' complete preemption argument fails because section 1132(a) does not displace Buster's claim.

[2] Buster's complaint asserts only a claim for state law misrepresentation by nondisclosure. Under section 1132(a), which authorizes suit by plan participants, beneficiaries, or fiduciaries, he could possibly bring only the following actions:[3]

> (2) . , . for appropriate relief under section 1109 of this title: [or]

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[3] Buster was found to be an ERISA fiduciary in the prior litigation and in that capacity would have standing to assert claims otherwise allowed by the statutory scheme. *See Harris*, 26 F.3d at 934; *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1027 (9th Cir. 1995).

> (3) . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Neither subsection displaces Buster's claim. Subsection (3) is inapplicable by its terms, because Buster seeks neither to enjoin any act or practice" nor "to obtain other appropriate equitable relief." He seeks only damages.

Subsection (2) incorporates section 1109. which provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations. or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . .

Buster, however, is not bringing an *action on behalf of the plan* as required by the plain language of section 1109 and our decision in *Kim v. Fujikuwa*, 871 F.2d 1427, 1432 (9th Cir. 1989)(section 1109 "only establishes remedies for the benefit of the plan").

2. Ancillary Jurisdiction

Relying on *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), the district court determined that its authority would be undermined by allowing what it concluded was a retaliatory lawsuit to proceed in state court. Although we share the district court's concern with such attacks on federal judgments, and sympathize with litigants subjected to such suits, *Kokkonen* does not support this exercise of jurisdiction.

[3] In *Kokkonen* the Supreme Court noted that it had allowed the exercise of ancillary jurisdiction "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Id. at 380. However, the Court also cautioned that the doctrine is limited to "matters . . . that are *incidental to other matters* properly before [the court]." *Id.*

(emphasis added). The district court lacked this important prerequisite. An amended final judgment in the prior suit was entered in April 1993. but this action was not filed until September 1994. Because there was no action to which Buster's claim could be deemed ancillary, the court erred in taking jurisdiction. See also *Peacock v. Thomas.* 116 S.Ct. 862. 867 (1996)("In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction"); In re Hunter, 66 F.3d 1002, 1005 (9th Cir. 1995) (link to prior proceeding insufficient basis to assert ancillary jurisdiction over independent fraud action).

B. Sanctions

Buster and Petersen appeal the award of Rule 11 sanctions. We review for abuse of discretion. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

The district court found that this suit was "patently frivolous," brought in bad faith, and solely for the purpose of harassment in violation of Rule 11, which, in relevant part, provides:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -
>
> (1) it is not being presented for any improper purpose. such as to harass or cause unnecessary delay or needless increase in the cost of litigation:
>
> (2) the claim, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

In concluding that Buster's claim was both frivolous and brought for an improper purpose, the district court was well within its discretion.[4]

[4] "Frivolous" filings are those that are "both baseless and made without a reasonable and competent inquiry." *Townsend V. Holmun Consulting Corp.*, 929 F.2d 135X. 1362 (9th Cir. 1990)(en banc). The district court concluded that this suit was barred by the res judicata and collateral estoppel effects of the prior judgment. These findings are supported by the record, and a reasonable and competent inquiry would have led to the same conclusion. This action involves the same parties and the same

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[4] Buster's argument that the district court could not impose sanctions based upon a complaint filed in state court ignores the 1993 amendments to Rule 11. Although prior to the amendments conduct was measured only at signing, *see Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir. 1987), Rule 11 not authorizes sanctions for "presenting to the court (whether by signing, filing, submitting, or later advocating)" a document otherwise sanctionable. *See Bisciglia v. Kenosha Unified School Dist. No. 1*, 45 F.3d 223, 227 n.5 (7th Cir. 1995); Developments in the Law - - Lawyers' Responsibilities and Lawyers' Responses, 107 Harv. L. Rev. 1547, 1635 (1994). Thus, as the Advisory Committee noted "if after a notice of removal is filed, a party urges in federal court the allegations of a pleading file din state court . . . . it would be viewed as 'presenting'-- and hence certifying to the district court under Rule 11--those allegations. " Buster has continued to urge the allegations in his complaint since removal.

Furthermore, Buster's motion for summary judgment, filed after removal, provides an independent basis for sanctions.

"transactional nucleus of fact" as the prior suit and it seeks to relitigate issues that were conclusively resolved in the prior suit. *See In re Grantham Brothers*, 922 F.2d 1438, 1442 (9th Cir. 1990)(collateral attack with no basis in law or fact is frivolous under Rule 11), *cert. denied*, 502 U.S. 826 (1991); *Roberts v. Chevron*, 117 F.R.D. 581 (M.D.La 1987) (bringing state court action attacking prior federal judgment and failing to dismiss after removal justified Rule 11 sanctions; reasonable inquiry would have shown that res judicata barred action). *aff'd*, 857 F.2d 1471 (5th Cir. 1988). The district court did not abuse its discretion in concluding that Buster's claim was frivolous.

[6] Buster and Petersen contend that our conclusion that the district court lacked subject-matter jurisdiction renders void the order awarding sanctions. The Supreme Court rejected this precise argument in *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992): "A final determination of lack of subject matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automat-

ically wipe our all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *See also Branson v. Nott*, 62 F.3d 287, 293 (9th Cir.)(that the district court lacked subject matter jurisdiction does not preclude it from imposing Rule 11 sanctions), *cert. denied*, 116 S.Ct. 565 (1995). The award of sanctions survives our jurisdictional ruling.[5]

[7] Finally, Petersen argues that he was not afforded due process before the imposition of sanctions. This argument itself borders on the frivolous.[6] Due process requires notice that the court is considering sanctions and an opportunity to be heard in opposition. *Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594. 597 (9th Cir. 1993). Buster and

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[5] Buster contends that the district court erred by including in the sanction award fees and expenses incurred in pursuing the motion. We disagree. Although he states correctly the law prior to the 1993 amendments to Rule 11, *see Pan-Pacific v. Pacific Union*, 987 F.2d 594, 597 (9th Cir. 1993), he ignores the Rule's plain text, which now provides that "the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.:" Fed.R.Civ.P 11(c)(1)(A)

[6] As does the assertion that the Seventh Amendment requires a jury trial before sanctions in excess of twenty dollars can be imposed.

Petersen were timely served with the Trustees' motion and filed a twelve-page memorandum in opposition with an attached eleven-page affidavit by Petersen. They had both adequate notice and an opportunity to be heard.

CONCLUSION

We vacate the district court's summary judgment and affirm the award of sanctions. Buster and Petersen shall bear the costs of appeal.

VACATED IN PART; AFFIRMED IN PART.

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Buster v. Greisen, et al
Case No. A94-0475-CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management: 271-3235*

PROCEEDINGS: **ORDER FROM CHAMBERS**

Defendants Ronald E. Greisen, Henry P. Head, and David L. Ratchye (collectively called "Head") seek attorney's fees from Plaintiff Jack B. Buster ("Buster") and Buster's attorney, A. Lee Petersen, after successfully defending a lawsuit brought by Petersen against them on Buster's behalf. Docket Nos. 72 & 76. The motion is opposed. Docket No. 75. The parties have thoroughly briefed their respective positions and oral argument would not be helpful. Thus, the matter will be decided on this record. D. AK. LR. 7.1(I); United States v. Cheely, 814 F. Supp. 1430, 1436 n.4 (D. Alaska 1992) (discussing the circumstances under which oral argument is allowed in this Court under a predecessor essentially identical rule.)

Jurisdiction in this case is based upon federal questions related to the Federal Employee Retirement Income Security Act ("ERISA"). See 29 U.S.C. § 1132(e) and § 1451(c) and 28 U.S.C. § 1331[7] To under-stand the context in which the motion for attorney's fees arose and the basis for this Court's jurisdiction, it is necessary to review this case's procedural history. Buster was a fiduciary for an ERISA plan operated by Head as trustee for the employees of a C.P.A. firm, Thomas, Head & Greisen. Head successfully sued Buster for breach of his fiduciary duties to the plan in this Court. See *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994). Thereafter, Buster brought this action for misrepresentation in state court against Head arguing that Head had, in effect, made misrepresenta-tions by omission. Buster argued that Head had not warned Buster that, in Head's view, Buster was an ERISA plan

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[7] Buster has been found to be a fiduciary under an ERISA plan, *Thomas, Head & Greisen*, 24 F.3d at 1115-20, and; in this action, seeks to relitigate his responsibilities to the plan, its trustees, and the other fiduciaries based on his contention that he was fraudulently led into becoming a fiduciary to the plan. This is clearly an action contemplated by ERISA. *See* 29 U.S.C. § 1451 (permitting an action by a fiduciary who is adversely affected by the act or omission of any party under the subtitle, *i.e.*, another fiduciary with respect to a plan for legal or equitable relief). Buster is suing for an omission to warn him about his fiduciary responsibilities to the plan. 29 U.S.C. § 1451(a)(1).

fiduciary who therefore could become liable to the plan for fraud under a heightened standard of care. Because failure to disclose opinions about the law would not qualify as misrepresentations, it is clear that Buster was, in effect, pleading a claim for civil entrapment, malicious prosecution, or abuse of process. This analysis is made more clear by review of the damages claimed which where, in essence, directly related to Buster's being sued by Head and losing the prior lawsuit. Head removed this action to this Court, arguing that it was an action by a plan fiduciary to determine the scope of his fiduciary responsibilities and obtain contribution from his co-fiduciaries for the damages he is obligated to pay the trust. *See* 29 U.S.C. § 1132(c) (giving this Court exclusive jurisdiction over actions by fiduciaries regarding their duties to plans, participants and trust-ees); *see also* 29 U.S.C. § 1109 (providing for liability for breach of a fiduciary duty). This Court recognized that the question was close and that the United States Supreme Court had specifically denied federal courts removal jurisdiction over actions for abuse of process brought in state court where the allegedly abusive process originated in federal court. *See Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). Nevertheless, this

Court denied Buster's motion to remand, finding that his action, if permitted, would be so chilling on the exercise of federal rights granted by ERISA that an exercise of jurisdiction by this Court was necessary to protect its judgments and allow litigants the protec-tion intended by ERISA. *See* order at Docket 13 which was affirmed on reconsider-ation at Docket No. 25. This Court found that the assertion of jurisdiction was necessary "to enable [the] [C]ourt to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1676. (1994).

The case was referred to Magistrate Judge John Roberts who was administering Head's efforts to collect the judgment previously awarded against Buster. The parties filed cross-motions for summary judgment. Magistrate Judge Roberts re-viewed the record, heard oral argument, and recommended that judgment be entered in favor of Head and against Buster. In Magistrate Judge Roberts' report and recommendations, he concluded that Buster had not stated a claim against Head for misrepresentation under Alaska law and that his action was a disingenuous attempt to circumvent the Ninth Circuit's decision

in this case and harass Head for successfully suing Buster in the prior action. Docket Nos. 61 & 65. After a *de novo* review of the record and the exercise of its independent judgment, this Court agreed with Magistrate Judge Roberts and entered an order granting Head summary judgment. Docket No. 66. This Court found that Buster's action was barred by the doctrines of *res judicata* and collateral estoppel, because Buster's theory of civil entrapment would have been a compulsory counterclaim or an affirmative defense to the prior action.[8] Judgment was therefor entered in favor of Head and against Buster, and Head was awarded costs of action. Docket No. 67.

This Court has reviewed the motion for attorney's fees at Docket No. 72 and finds that the hours worked and the fees charged are

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[8] Magistrate Judge Roberts' invocation of *res judicata* and collateral estoppel, which was clearly correct on this record, suggests an alternate basis for jurisdiction; this Court's power to enjoin state court actions in which litigants seek to relitigage matters resolved against them in federal court. *See, e.g., Western Sys., Inc. v. Ulloa,* 958 F.2d 864 (9th Cir. 1992); *Amwest Mortgage Corp. v. Grady,* 952 F.2d 11623 (9th Cir. 1991). Alaska would not require mutuality of estoppel where the party against whom estoppel is urged had a full and fair opportunity to litigatge the issues in the prior proceeding. *Pennington v. Snow,* 471 P.2d 370 (Alaska 1970). Buster thoroughly litigatged the issues which doom this action in the proceeding before Judge von der Heydt and therefore is bound by all factual determinations made in that case: he was a fiduciary, he breached his fiduciary duty, he is liable to the plan, and he is not entitled to con-tribution from the other fiduciaries.

reasonable for comparable actions by men and women of comparable skill, education, and experience in this District. This Court therefore is prepared to award the sum requested: $29,244.00 against Buster. See 29 U.S.C. § 1451(e). Head also argues that the award should be made as a sanction against Buster and Petersen for bringing a patently frivolous action, in bad faith, solely for the purpose of harassing the Defendants and disrupting their reasonable efforts to collect the judgment previously awarded against Buster. See 28 U.S.C. § 1927, FED R. CIV. PROC. 11, D. AK. LR 1.3; *see also Cox v. Nasche*, 149 F.R.D. 190 (D. Alaska 1993) (discussing an award of attorney's fees against an attorney who litigated in bad faith).

Petersen should be jointly and severally liable for the attorney's fees to be awarded in this action. The motion gave him notice of the application, and he has made his defense. *See* Petersen's affidavit accompanying Buster's opposition at Docket No. 75; *see also* Docket No. 75 at 11.[9] This Court agrees with Magistrate Judge Roberts that Petersen has been disingenuous in his published remarks in this case.

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[9] Because the motion notified Petersen that fees were sought against him as well as his client, he has received the hearing contemplated by *Ulloa*, 958 F.2d at 873.

The only possible explanation for this lawsuit and Petersen's conduct is that he brought this patently frivolous case, in bad faith, solely for purposes of harassment. Petersen is not a new attorney. He is a former deputy United States Attorney who has practiced in this Court for many years. There is simply no excuse for his actions in this case. *See Cox*, 149 F.R.D. at 197-98. None of the possible excuses noted in Cox could possibly apply in this case. Petersen should share in liability for the judgment for fees rendered in this case. In *Cox*, this Court discussed in detail why it believes an award of attorney's fees is the appropriate measure of sanctions where an action or motion is brought in bad faith purely for purposes of harassment and to force an opponent to suffer economic waste by incurring unnecessary attorney's fees, because the fees incurred are a proper measure of the damage suffered.

IT IS THEREFORE ORDERED:

The motion for attorney's fees at Docket No. 72 is GRANTED. The Clerk shall enter judgment in favor of the Defendants and against Jack B. Buster and A. Lee Petersen jointly and severally in the amount of $29,244.00.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: February 21, 1996 SECRETARY'S INITIALS ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER. Any request for other information or for clarification, modification, or reconsideration of this Order, or for extension of time must be made in the form of a motion. See FED. R. CIV. P. 7(b)(1); D. Ak. LR 7.1(1). No one should telephone, fax or write to chambers regarding pending cases. The judge's secretary and law clerks are not permitted to discuss any aspect of this case, provide any infor-mation or communicate with any person including litigants, lawyers, witnesses and the general public regarding cases.

Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

No. 97-285

In The

Supreme Court of the United States

October Term, 1996

JACK B. BUSTER and A. LEE PETERSEN,

Petitioners,

vs.

RONALD E. GREISEN, HENRY P. HEAD and DAVID L. RATCHYE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should consider a case of first impression in which an appellate court has applied the 1993 Amendments to Federal Rule of Civil Procedure 11 to a case which was removed.

2. Whether the decision of the Ninth Circuit Court of Appeals conflicts with the decision of this Court in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992).

3. Whether the procedure by which the district court imposed Rule 11 sanctions violated principles of due process when Petitioners had ample notice and opportunity to be heard.

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STATEMENT OF THE CASE

This is the third occasion on which Petitioner Jack B. Buster (hereinafter "Buster") has asked this Court to hear a case resulting from his own substantial material misrepresentations concerning investments made by a trust.[1] The investments at issue were made by a trust, which was organized and operated pursuant to ERISA, in deed of trust notes secured by real property. Thomas, Head & Greisen is a small professional corporation of certified public accountants. *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114, 1116 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 935 (1995). The corporation set up the Thomas, Head & Greisen Employees Trust, (hereinafter "the Trust"). The Trust was organized and operated pursuant to ERISA. *Buster*, 24 F.3d at 1116. Respondents Ronald E. Greisen, Henry P. Head, and David L. Ratchye (hereinafter "Trustees"), were Trustees of the Trust. *Id.* However, Respondent David L. Ratchye ceased being a Trustee for the Trust on June 30, 1984. Buster developed a business relationship with the Trust whereby Buster would locate and investigate deed of trust notes for investment by the Trust. *Buster*, 24 F.3d at 1116. Buster earned a commission for the sale of these notes. *Id.*

In 1983, Buster joined with Terry Parks (hereinafter "Parks") and formed a partnership, Northern Financial. *Id.* Buster introduced Parks to the Trustees and explained their new partnership. *Id.* Buster and Parks continued to provide investment advice and recommendations regarding deed of trust purchases. *Id.* The only difference in the relationship was the Trust now bought its notes from Northern Financial instead of Buster as an individual. *Id.*

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1. The prior two cases are *Buster v. Thomas, Head & Greisen Employees Trust*, No. 94-970 (October Term 1994) and *Buster v. Thomas, Head & Greisen Employees Trust*, No. 96-1013 (October Term 1996).

During 1986, the Trust purchased four deed of trust notes, the sale of which became the subject of the lawsuit entitled, *Thomas, Head & Greisen Employees Trust, Ronald E. Greisen, and Henry P. Head v. Jack Buster, Terry Parks & Northern Financial*, No. A89-071 Civ. (Alaska filed Feb. 24, 1989).[2] After the purchases, the Trust discovered Buster and Parks had made numerous substantial material misrepresentations when they recommended the purchase of the notes. These misrepresentations are detailed in the district court's findings of fact and conclusions of law from Case No. A89-071 Civ. (RA. 1a.)[3] Specifically, the district court concluded Buster had rendered investment advice for a fee pursuant to a mutual verbal understanding whereby the investment advice rendered by Buster and Parks would serve as the primary basis for investment decisions by the Trust. (RA. 10a.) The investment advice was individualized to the Trust based on the Trust's particularized needs. (RA. 10a.) As a result of Buster and Parks substantial material misrepresentations, the Trust suffered losses in excess $142,000 with respect to three of the notes. (RA. 13a.) On April 5, 1993 an amended judgment was entered in the amount of $190,057.64.[4]

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2. On appeal this case became *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 935 (1995).

3. All references to the appendix to Respondents' Brief in Opposition will be identified by "RA" and the page number. All other references are to the appendix to Petitioners' Petition for Writ of Certiorari.

4. All pertinent facts have been determined by a previous proceeding between the parties. Trustees' statement of the case is based on the facts contained in the findings of fact and conclusions of law of the previous proceeding and the facts contained in the Ninth Circuit Court of Appeals' Opinion in *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d

(Cont'd)

Since the entry of judgment, Buster has committed a long running series of acts calculated to frustrate the efforts of the Trustees to collect on the judgment. Buster's acts resulted in a fraudulent conveyance action being filed against Buster and the transferees of his assets. The fraudulent conveyance action ended with a default judgment in favor of the Trust. The default judgment was upheld on appeal. *See Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1114 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997). Buster and the transferees of his assets were later sanctioned by the district court for dissipating assets in violation of the terms of the default judgment. These sanctions are currently the subject of another appeal to the Ninth Circuit Court Appeals entitled *Thomas, Head & Greisen Employees Trust v. Buster*, No. 96-35746 (9th Cir. filed Mar. 4, 1996).

Finally, Buster filed this entirely new lawsuit seeking to pass the blame for his misconduct on to the Trustees of the Trust to which he was found liable. The instant lawsuit was originally filed in the Superior Court for the State of Alaska, Case No. 3AN-94-7337 Civ. The Trustees removed this case to federal court, contending that either ERISA's complete preemption doctrine or the district court's ancillary jurisdiction conferred federal question jurisdiction over Buster's complaint. *Buster v. Greisen*, 104 F.3d 1186, 1188 (9th Cir. 1997).

Shortly thereafter, counsel for Respondents sent Petersen a letter in which counsel expressed the view that this new lawsuit was vexatious and brought in bad faith. Further, counsel for

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(Cont'd)
114 (9th Cir. 1994). It is important to note that Petitioners' statement of the case is based, in large part, on information obtained from affidavits filed by Petersen and Buster in this case. To the extent these facts are inconsistent with the facts as determined by the previous proceeding between the parties, collateral estoppel prevents reliance on these facts.

Respondents cautioned that if Petitioners chose to continue to pursue the claims, counsel would have no choice but to recommend to Respondents they pursue both Buster and Petersen for all recoverable costs and fees associated with defense of the case. This letter specifically referenced Rule 11.

After denying Buster's motion to remand, the district court granted the Trustees' motion for summary judgment. *Id.* Subsequently, the Trustees moved for an award of attorney fees against Buster and his attorney, Petitioner, A. Lee Petersen (hereinafter "Petersen"). In this motion the Trustees set forth each theory under which they believed they were entitled to an award of attorney fees. Buster and Petersen were timely served with Trustees' motion and filed a 12-page memorandum in opposition with an attached 11-page affidavit from Petersen. *Buster v. Greisen*, 104 F.3d at 1190.

In considering the motion, the district court determined, "the only possible explanation for this lawsuit and Petersen's conduct is that he brought this patently frivolous case, in bad faith, solely for purposes of harassment." (RA. 19a.) The district court also indicated it believed an award of attorney fees was the appropriate measure of sanctions. (RA. 19a.) In a subsequent order, the district court indicated it had the authority to enter such a sanction not only based on Rule 11, but also under its inherent authority. (RA. 20a.)

On appeal, the Ninth Circuit Court of Appeals determined the district court did not have ancillary jurisdiction over the removed action. *Buster*, 104 F.3d at 1189. However, the Ninth Circuit Court of Appeals held the district court acted within its discretion in imposing Rule 11 sanctions because Buster and Petersen continued to advocate the frivolous allegations contained in the complaint after removal. *Id.* at 1190. Further, Buster's motion for summary judgment provided an independent

basis for sanctions. *Id.* Finally, the Ninth Circuit Court of Appeals determined that Petersen's argument that he was not awarded due process before imposition of sanctions bordered on frivolous. *Id.* Petersen and Buster had adequate notice and an opportunity to be heard. *Id.*

SUMMARY OF ARGUMENT

None of the compelling reasons which occasionally warrant granting a petition for writ of certiorari exist in this case. In upholding the sanctions against Buster and Petersen, the Ninth Circuit Court of Appeals relied on the 1993 amendments to Federal Rule of Civil Procedure 11. Application of the 1993 amendments to a case which was removed has not been the subject of any reported decision of which Respondents are aware. This is a case of first impression. However, the Ninth Circuit Court of Appeals' opinion is consistent with the advisory committee notes, an opinion of the Seventh Circuit Court of Appeals, and other learned authorities. Further, the authorities relied upon by the Petitioners predate the amendments and do not address the issues presented in this case.

In upholding the sanctions against Buster and Petersen, the Ninth Circuit Court of Appeals did not render a decision which is in conflict with a decision of this Court. In fact, the opinion of this Court as set forth in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992) supports the lower court's decision.

Finally, the procedure by which the district court imposed Rule 11 sanctions did not violate principles of due process. Buster and Petersen had ample notice and opportunity to be heard.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY REPORTED DECISION.

This is a case of first impression.[5] In upholding the sanctions, the Ninth Circuit Court of Appeals relied on the 1993 amendments to Federal Rule of Civil Procedure 11. *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997). Prior to the amendments, Rule 11 required a "snap-shot" approach, under which the conduct of the signor would be measured at the time signing only. *Developments in the Law — Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev., 1547, 1636 (1994). However, signing is no longer the only sanctionable conduct. Rule 11 now authorizes sanctions when an issue is presented to the district court. Presentation includes signing, filing, submitting, or later arguing. Fed. R. Civ. P. 11(b). In effect, post amendment Rule 11 requires a continuing "duty of candor" to the court. 107 Harv. L. Rev., at 1636. Application of this continuing duty to a case which was removed has not

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5. This fact, is cause to deny the Petition of Writ of Certiorari. In the past, this Court has expressed a desire to allow lower courts the opportunity to fully consider an issue before it is addressed by this Court. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (*cert. denied* where issues required "further study" in the lower courts "before it is addressed by this court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983); (Marshall, J. dissenting) (from denial of certiorari addressed to "those of my colleges who agree with me [on merits of issue] but believe this court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem").

been the subject of any reported decision of which Respondents are aware.[6]

This issue is addressed by the Advisory Committee Notes to the 1993 Amendments to Federal Rule of Civil Procedure 11. The advisory committee notes provide:

> . . . [A] litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. . . . [I]f after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remade), it would be viewed "as presenting" — and hence certifying to the district court under Rule 11 — those allegations.

This section was quoted favorably by the Seventh Circuit Court of Appeals in *Bisciglia v. Kenosha Unified School Dist. No. 1*, 45 F.3d 223, 1227 n.5 (7th Cir. 1995). In *Bisciglia*, the court considered arguments similar to those presented in this case. However, preamendment Rule 11 was applied. *Id.* at 226. By quoting the Advisory Committee Notes in a footnote, the *Bisciglia* court implies it may have reached a different decision had the amendments been in effect. *Id.* at 227. The effective date of the amendments was December 1, 1993.

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6. As discussed below, each of the authorities relied upon by Petitioners involves application of preamendment Rule 11.

Buster initiated this case in 1994. There is no question the 1993 amendments apply to this case. In considering the allegations raised by Buster, the district court determined, "Petersen has been disingenuous in his published remarks in this case. The only possible explanation for the lawsuit and Petersen's conduct is that he brought this patently frivolous case, in bad faith, solely for purposes of harassment . . . there is simply no excuse for his actions in this case." (A. 22-23.) The allegations raised in the complaint were reiterated in Buster's motion to remand and Buster's motion for summary judgment. Thus, they were presented to the district court and Rule 11 sanctions are appropriate. *See* Fed. R. Civ. P. 11.

The arguments raised by Buster and Petersen reveal a complete disregard for the current status of the law. Each of the authorities relied upon by Petitioners involve application of preamendment Rule 11.[7] Buster and Petersen repeatedly argue they were sanctioned for filing a complaint and amended complaint in state court. Petitioners simply do not recognize the authority to sanction pursuant to Rule 11, is no longer limited to the signing of a pleading. It is presentation to the court which is now at issue. In this case, the allegations in the complaint were repeatedly presented to the district court. For this reason, the district court had the authority to sanction Buster and Petersen.[8] Petitioners cite to no authority to the contrary.

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7. *Worthington v. Wilson*, 8 F.3d 1253, 1257-58 (7th Cir. 1993); *In re Summers*, 863 F.2d 20, 21-22 (6th Cir. 1988); *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126, 130 (5th Cir. 1988); *See Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir. 1987); *Stiefvater Real Estate, Inc. v. Hinsdale*, 812 F.2d 805, 809 (2d Cir. 1987); *Kirby v. Allageni Beverage Corp.*, 811 F.2d 253, 257 (4th Cir. 1987).

8. Petitioners argue the amount of the sanction was inappropriate because it included expenses incurred as a result of defending against

(Cont'd)

II.

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners erroneously assert the opinion of the Ninth Circuit Court of Appeals is in conflict with this Court's opinion as set forth in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). The opinion of the Ninth Circuit Court of Appeals in this case is consistent with *Willy*. In fact, the legal principles set forth in *Willy* form the basis of the opinion.

In *Willy*, this Court concluded Rule 11 sanctions could be enforced despite the lack of subject matter jurisdiction. Mr. Willy had sued Coastal Corporation in state court for claims arising from termination of his employment. *Willy*, 503 U.S. at 132. Coastal Corporation removed the case to federal court. The district court determined it had subject matter jurisdiction. Later, the district court dismissed the case for failure to state a claim and imposed Rule 11 sanctions against Willy and his attorney. On appeal, the Fifth Circuit Court of Appeals concluded the district court lacked subject matter jurisdiction, but upheld the Rule 11 sanctions. *Id.* In upholding the Rule 11 sanctions this Court states,

> A final determination of lack of subject matter-jurisdiction of a case in federal court, of course, precludes further adjudication of it. But, such a determination does not

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(Cont'd)
the motion to remand. However, Petitioners overlook the fact that the improper arguments raised in the complaint were presented to the district court in Buster's motion to remand. The improper allegations form the basis of Buster's argument that remand was appropriate.

> automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction.

Id. at 137. *See also Branson v. Knott*, 62 F.3d 287, 293 (9th Cir. 1994) (the fact that the district court lacked subject matter jurisdiction does not preclude it from imposing Rule 11 sanctions), *cert. denied*, 116 U.S. 565 (1995). This Court further states,

> [i]t is well established that a federal court may consider collateral issues after an action is no longer pending . . . [and] imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires a determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Id. citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990).

Petitioners argue that imposition of sanctions in this case constitutes a decision on the merits thus creating a conflict with *Willy*. This is simply not true. Consideration of improper allegations as the basis for a Rule 11 sanction does not signify a district court's assessment of the legal merits of the complaint. Illustrative of this point is this Court's opinion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

In *Cooter*, the district court levied Rule 11 sanctions as a result of "completely baseless" allegations contained in the complaint. *Id.* at 390. However, prior to considering the Rule

11 issue, plaintiff voluntarily dismissed the case pursuant to Federal Rule of Civil Procedure 41(a)(1). *Id.* at 395. Plaintiff then argued that voluntarily dismissing the action automatically deprived the court of jurisdiction over the action and rendered the court powerless to impose Rule 11 sanctions. *Id.* Considering this argument this Court determined,

> Because a Rule 11 sanction does not signify a district court's assessment of the legal merits of the complaint, the imposition of such a sanction after a voluntary dismissal does not deprive the plaintiff of his right under Rule 41(a)(1) to dismiss an action without prejudice. "[D]ismissal . . . without prejudice" is a dismissal that does not "operat[e] as an adjudication upon the merits," Rule 41(a)(1), and thus does not have a res judicata effect. Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint.

Id. at 396.

In this case, the imposition of Rule 11 sanctions was based on the fact that Petitioners continually presented improper allegations to the district court. Just as in *Cooter*, imposition of sanctions based on those improper allegations does not constitute a decision on the merits. The decision to impose Rule 11 sanctions was a determination of a collateral issue: whether Petitioners abused the judicial process. As such, it implicates no constitutional concerns because "it does not signify a district court's assessment of the legal merits of the complaint." *Willy* 503 U.S. at 138.

III.

THE PROCEDURE BY WHICH THE DISTRICT COURT IMPOSED RULE 11 SANCTIONS DID NOT VIOLATE THE PRINCIPLES OF DUE PROCESS.

The Petitioners once again claim they were not afforded due process of law. This argument was made before the Ninth Circuit Court of Appeals and that court determined, "this argument itself borders on the frivolous." *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997). Due process only requires notice and an opportunity to be heard in opposition. *Id.* citing *Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594, 597 (9th Cir. 1993); *United States v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973). In this case, the Trustees' motion set forth each theory under which they believed they were entitled to an award of fees.[9] Contrary to Petitioners' assertions, the request for sanctions was not limited to Petitioners' conduct of filing the complaint in state court.[10] Buster and Petersen were

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9. Among the theories set forth by trustees was that,

> Rule 11 provides that "by presenting to the court a pleading . . . an attorney . . . is certifying to the best of the persons knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, 1) it not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation."

(*See* Memorandum in Support of Motion for Attorney Fees, dated December 6, 1995 at 9.)

10. Page two of Respondents Memorandum in Support of Motion for Attorney Fees states, in pertinent part,

(Cont'd)

timely served with the Trustees' motion and filed a 12-page memorandum in opposition with an attached 11-page affidavit of Petersen. In considering the motion, the district court determined, "the only possible explanation of this lawsuit and Petersen's conduct is that he brought this patently frivolous case, in bad faith, solely for purposes of harassment." (RA. 19a.) Petitioners had notice and an opportunity to be heard. The district court did not violate the principles of due process.[11]

(Cont'd)

> After this case had been removed to federal court, Defendants sent A. Lee Petersen, counsel for Jack B. Buster, a letter. (*See* letter to Mr. A. Lee Petersen, dated January 4, 1995 and attached as Exhibit A.) Counsel for Defendants expressed the view that this new lawsuit was vexatious and brought in bad faith. Ex. A. Further, defense counsel cautioned that if Plaintiff **chose to continue to pursue his claims,** defense counsel would have no choice but to recommend to Defendants that Defendants pursue both Mr. Buster and his attorney A. Lee Petersen for all recoverable costs and fees associated with defense of this case.

(Emphasis added.)

11. In a superficial fashion, Petitioners argue that no sanctions should be imposed on Buster because Federal Rule of Civil Procedure 11(c)(2)(A) does not permit imposition of sanctions against a party who is represented by counsel. However, Petitioners overlook the fact that this section only applies to sanctions awarded pursuant to Rule 11(b)(2). It does not apply to sanctions awarded pursuant to Rule 11(b)(1) or (3).

CONCLUSION

For the reasons discussed above, Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED JULY 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

THOMAS, HEAD AND GREISEN EMPLOYEES TRUST, RONALD E. GREISEN and HENRY P. HEAD,

Plaintiffs,

vs.

JACK B. BUSTER, TERRY D. PARKS and NORTHERN FINANCIAL,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A89-071 Civil

The above cause was tried to the court at Anchorage, Alaska on June 8, 9 and 10, 1992.

The court heard opening statements, the testimony of witnesses, and final arguments of the parties, following which the case was submitted for decision.

Appendix A

FINDINGS OF FACT

I. *ERISA*:

A. *Stipulated Facts.*

1. Plaintiff Thomas, Head & Greisen Employees Trust ("Trust") was an employee trust for Thomas, Head & Greisen, a professional corporation, organized and operated pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").

2. From 1977 to 1983 Jack Buster dealt with Ronald E. Greisen for the purpose of selling him deed of trust notes.

3. During 1977 to 1990, the Trust was a limited partner, and Jack Buster was a general partner, in Kavik Mortgage Investors, a business which invested in deed of trust notes.

4. In 1983, Jack Buster and Terry Parks formed Northern Financial, a general partnership consisting of defendants Jack Buster and Terry Parks as equal general partners.

5. Defendants Jack Buster and Terry Parks, in their capacity as general partners of Northern Financial, dealt with the Thomas, Head & Greisen Employees Trust from 1983 until 1987.

6. At all relevant times during the period when Northern Financial was dealing with the Trust, plaintiffs Ronald E. Greisen and Henry P. Head were trustees of the Trust. Ronald E. Greisen and Henry P. Head are investors knowledgeable in deed of trust notes.

Appendix A

B. *Finding re ERISA Generally.*

The Thomas, Head & Greisen Employee Trust is the successor entity to two separate trusts created for the benefit of the employees of Thomas, Head & Greisen which were merged together in 1980.

C. *Falkenstein Note.*

1. *Stipulated Facts.* On or about May 1, 1984, Steven L. Falkenstein executed a promissory note between himself, as payor, and Lawrence Cornett III, as payee. The original principal balance on the note was $29,000 and bore interest at the rate of 10 percent per annum. The note was secured by a deed of trust on a certain parcel of real property located about 25 miles from Glennallen, and described in the deed of trust as the:

> Northeast one-quarter of the Southwest one-quarter of the Northeast one-quarter of the Southwest one-quarter (NE1/4 SW1/4 NE1/4 SW1/4) of Section 11, Township 1 South, Range 1 East, Copper River Meridian, in the Chitina Recording District, Third Judicial District, State of Alaska.

On or about February 6, 1986, Northern Financial purchased the note from Lawrence Cornett, III, for the sum of $17,158.53. On or about March 7, 1986, the Trust purchased the Falkenstein note for the sum of $21,700. At the time of purchase, payments were current on the note, and the note had a principal balance of $27,803.19.

Appendix A

2. *Findings re Falkenstein Note.*

a. On or about March 7, 1986, in connection with the sale of the Falkenstein note to the Trust, defendant Terry D. Parks represented to Ronald E. Greisen that (a) the property was located near Glennallen, (b) that the payor Steven Falkenstein grew up in Glennallen, (c) the payor was employed by ARCO (Supply Division) on the North Slope, (d) the payor was married, (e) his spouse was employed as a sixth grade school teacher by the local school district, (f) the payor owned a fishing boat in Valdez, (g) the payor owned an airplane, (h) the property appeared to be 10 acres, more or less, (i) the property was purchased by Mr. Falkenstein for $49,000, (j) Mr. Falkenstein put $20,000 down when he purchased the property, (k) the property had been substantially improved in the amount of $20,000 by virtue of Mr. Falkenstein's construction of a new barn, fence and a small addition to the house on the property, and (l) Mr. Falkenstein had $40,000 equity in the property, representing his $20,000 down payment and the improvements. The court finds these representations were material to the Trust's decision to purchase the Falkenstein note, and that it relied on defendant's representations in doing so. The court further finds that these representations were either intentional or in reckless disregard of trust of falsity.

b. In actuality, (a) the payor grew up in Petersburg, (b) the payor was not then employed by Arco (Supply Division), (c) the payor was not married but had divorced in 1983, (d) the payor's former wife had no teaching certificate and was not employed outside the home, (e) the payor has never owned a fishing boat in Valdez, (f) or an airplane, (g) the property was actually two and one-half acres more or less, (h) the property was purchased for $29,000, (i) Mr. Falkenstein did not

substantially improve the property, (j) Mr. Falkenstein never built a barn or a fence on the property, and (k) Mr. Falkenstein made no down payment on the property.

c. The last monthly payment on the Falkenstein note was February 24, 1987, which brought the interest to current status.

d. The Trust suffered a loss and sustained damages as a result of defendant Northern Financial's breach of fiduciary duty, including interest to June 8, 1992, in the amount of $25,219.21.

e. The court finds that plaintiffs' efforts to mitigate their damages were reasonable under the circumstances of the case.

D. *Kern Note.*

1. *Stipulated Facts.* On or about June 18, 1985, Frederick L. Kern executed a promissory note between himself, as payor, and Billie Poole, Jr. and Bernice Sue Poole, as payees. The original principal balance on the note was $49,500 and bore interest at the rate of 12 percent per annum. The note was secured by a deed of trust on a certain parcel of real property described in the deed of trust and located in the end of the Rainbow subdivision in Wasilla. On or about April 24, 1986, Northern Financial purchased the note from the Pooles for the sum of $30,100. On or about April 28, 1986, defendants communicated to Ronald E. Greisen an offer to sell the note to the Trust. On or about April 29, 1986, the Trust purchased the Kern note for the sum of $36,250. At the time of the purchase, payments were current on the note, and the note had a principal balance of $44,714.07.

Appendix A

2. *Findings re Kern Note.*

a. On or about April 28, 1986, in connection with the offer and sale of the Kern note, defendant Parks represented to Ronald E. Greisen, as trustee of the Trust, that (a) the payor was a dirt contractor, (b) the payor's spouse, JoAnn Kern, was employed as an Alaska State Trooper, (c) that she had been so employed for six years, (d) that the payor and his wife had only recently married, and (e) that Terry Parks had inspected the house and it was completed. The court finds these representations material to the Trust's decision to purchase the Kern note, and that it relied on defendants' representations in doing so.

b. The court further finds that these misrepresentations were either intentional or in reckless disregard of truth or falsity.

c. In actuality, the facts were that (a) the payor was a carpenter who sub-contracted his services, (b) the payor's spouse, Patricia Kern, was not then or (c) had she ever been employed as an Alaska State Trooper, (d) she was an unemployed housewife with seven children, and (e) Mr. Parks had not inspected the house.

d. The property securing the Kern note was resold by the Trust on October 1, 1991. Plaintiffs took reasonable steps to mitigate their damages prior to the sale by restoring the property to salable condition and holding it until real estate values increased.

e. The trust suffered a loss and sustained damages as a result of defendant Northern Financial's breach of fiduciary duty, including interest to June 8, 1992, in the amount of $50,189.55.

Appendix A

E. *The Bergin Note.*

1. *Stipulated Facts.*

a. On or about June 25, 1982, John L. and Judy M. Bergin executed a promissory note between themselves, as payors, and William M. and Ruth M. Schofield, as payees. The original principal balance on the note was $56,843.38 and bore interest at the rate of 10 percent per annum. The note was secured by a deed of trust on a certain parcel of real property described in the deed of trust and located in the Woodland Park subdivision in the Spenard area of Anchorage. Northern Financial purchased the note from the Schofields. On or about April 18, 1986, defendants communicated to Ronald E. Greisen an offer to sell the note to the Trust. On or about April 29, 1986, the Trust purchased the Bergin note for the sum of $35,150. At the time of purchase, payments were current on the note, and the note had a principal balance of $50,965.47.

b. In actuality, the property was (a) located in Woodland Park subdivision next to railroad tracks in the Spenard area of Anchorage, and (b) the actual assessed value of the property in 1986 was $143,800.

c. The last payment on the Bergin note was February 25, 1988 which brought the interest to current status.

d. The principal balance at the time of default was $46,377.65 plus interest at 10 percent from February 25, 1988.

e. On or about April 18, 1988 the Trust retained Jack Clark to file suit on the promissory note. On or about June 20, 1988 the State of Alaska, Division of Investments, commenced

nonjudicial foreclosure because the $51,027.19 first deed of trust was delinquent. On or about March 23, 1989 the Trust obtained a judgment against the Bergins for $52,219.50. On April 3, 1989 John L. and Judy M. Bergin filed a Chapter 7 bankruptcy in the Western District of Washington. On or about April 19, 1989, the Trust filed a proof of claim with the bankruptcy court in the amount of $52,376.87. On or about July 7, 1989 the debtors were discharged from their pre-petition obligations. The Trust paid a $22.50 escrow termination fee and expended $773.42 in attorney's fees for a total of $795.92.

2. *Findings re Bergin Note.*

a. On or about April 18, 1986 in connection with the offer and sale of the Bergin note to the Trust, defendant Buster represented to Ronald E. Greisen, as trustee of the Trust, that the real property securing the note was (a) located east of Merrill Field in the Wonder Park subdivision of Anchorage, and (b) that the assessed value of the property was $166,000.

b. The court finds these representations were material to the Trust's decision to purchase the Bergin note, and that it relied on defendants' representations in doing so.

c. Access to the Bergin property was and continues to be through an alley, and there is no developed access from the platted street. The court finds defendants' failure to disclose these facts material to the Trust's decision to purchase the Bergin note.

d. The Trust suffered a loss and sustained damages as a result of defendants Northern Financial's breach of fiduciary duty, including interest to June 8, 1992, in the amount of $67,336.95.

e. Plaintiffs took reasonable steps to mitigate their damages by pursuing a judgment against the payors on the note. The court finds it was not unreasonable for plaintiffs to refuse to assume the first deed of trust, held by the State of Alaska, since no equity existed in the property for the second deed of trust.

F. *The Smith Note.* The Trust suffered no loss and sustained no damages on the Smith note, and therefore the court enters no other finding and awards no damages on this note.

G. *Findings re Fiduciary Status of Defendants.*

1. Defendants rendered investment advice to the Trust as to the value of the Falkenstein, Kern, Bergin and Smith notes by virtue of their having presented yield sheets, mortgage analyses, purchase prices and other information to trustee Ronald E. Greisen.

2. Defendants made recommendations as to the advisability of the Trust investing in the Falkenstein, Kern, Bergin and Smith notes by virtue of defendants' investigation into and screening of those notes by applying the investment criteria previously articulated to them by the trustee Ronald E. Greisen, and by subsequently presenting those notes to the Trust with a recommendation to purchase them.

3. Defendants rendered investment advice to the Trust on a regular basis as evidenced by the Trust's purchase of 61 notes over a nine and one-half year period.

4. Defendants rendered investment advice to the Trust pursuant to a mutual understanding that defendants' advice

would serve as a primary basis for the investment decisions of the Trust, and that defendants' advice would be individualized investment advice based on the particular needs of the Thomas, Head & Greisen Employee Trust, concerning such matters as the Trust's investment policies or strategies, overall portfolio composition or diversification of plan assets. Defendants' advice served as a primary basis for the Trust's investment decisions. In the course of Northern Financial's dealings with the Trust, the Trust invested approximately 40% of its total assets in investments recommended by defendants. The advice rendered by defendants was individualized to the Trust based on its particularized needs. Mr. Greisen personally met with the defendants and discussed the need for diversification of plan assets, both geographically and by asset type, as well as the overall investment strategy of the Trust. Mr. Greisen articulated parameters for Trust investments, and defendants were aware of what types of investments were suitable for the Trust. Defendants used the Trust's investment parameters to investigate and screen such notes before they were recommended to the Trust.

Defendants understood that the trustees were relying on them to investigate and screen such notes, and to present only suitable opportunities to the Trust.

Defendants' compensation amounted to thousands of dollars on each of the notes in question; it is unreasonable to assume that Mr. Greisen and Mr. Head would agree to compensation in that amount unless they understood that defendants were providing a substantial service to the Trust in return.

5. Mr. Buster was also a fiduciary to plaintiffs by virtue of his being a general partner, and they being limited partners,

in Kavik Mortgage Investors. The court concludes that any reasonable person, when dealing with another who serves two different masters, only one of which is owed a fiduciary duty, would not proceed before ascertaining which entity he was purporting to be representing.

6. Defendants received compensation for rendering investment advice to the Trust. The price of the notes offered to the Trust were fixed by defendants to yield a 20% return to the Trust on its invested funds.

7. In late April or early May of 1986, defendant Jack B. Buster was aware that the Falkenstein, Kern and Smith notes had been sold to the Trust by Northern Financial. Mr. Buster considered these notes unsuitable investments for the Trust. In a conversation with Mr. Greisen, Mr. Buster expressed his surprise that the Trust had purchased the notes in question.

At that time, Northern Financial had a fiduciary duty to advise the Trust that the notes in question were not suitable investments for the Trust, and the reasons for such a conclusion.

II. *ALASKA SECURITIES ACT.* The court finds the award of damages to plaintiffs under ERISA to be fully adequate under the law and evidence in this case, and therefore enters no Findings or damage award under the Alaska Securities Act.

III. *ASSIGNMENT.* The Trust has assigned to the plaintiffs Ronald E. Greisen and Henry P. Head the causes of action which are the subject of this litigation.

IV. The court finds plaintiffs' proof insufficient by a preponderance of the evidence regarding defendants' financial profit and therefore awards plaintiffs no damages thereon.

Appendix A

CONCLUSIONS OF LAW

I. *GENERAL.*

A. The court has jurisdiction.

B. Defendant Northern Financial and individual defendants Jack B. Buster and Terry D. Parks are liable for any breach of fiduciary duty by any of the defendants, by virtue of the general partnership between Jack B. Buster and Terry D. Parks.

C. The interest acquired by the Trust in purchasing the deed of trust notes in each of the four transactions at issue was an interest in real property.

D. Defendant Jack B. Buster owed a fiduciary duty to Thomas, Head & Greisen Employees Trust by virtue of his being a general partner in Kavik Mortgage Investors and the Trust being a limited partner in that venture.

II. *ERISA*

A. Defendants were fiduciaries within the meaning of 29 U.S.C. § 1002(21)(a)(2) and 29 C.F.R. § 2510.3-21, by virtue of having rendered investment advice for a fee pursuant to a mutual verbal understanding whereby the investment advice rendered by defendants would serve as a primary basis for investment decision by the Trust, and that the investment advice would be individualized to the Trust based on the Trust's particularized needs, incident to the four transactions at issue in this case.

B. Defendants breached the prudent man standard of

Appendix A

ERISA with respect to each of the three transactions in question by failing to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

C. Defendants breached their fiduciary duty to the Trust under ERISA by making untrue statements of material fact in connection with the offer and sale of the notes in question to the plaintiff Trust.

D. Defendants breached their fiduciary duty to the Trust under ERISA by failing adequately to investigate the information they passed on to the Trustees regarding (1) the collateral on the notes and (2) the payors' ability to make payments on the notes.

E. Defendants breached their fiduciary duty to the Trust under ERISA by failing to disclose that access to the Bergin property was through an alley, that there was no developed access from the platted street, and the property was located in the Spendard area of Anchorage.

F. Mr. Buster and Northern Financial breached their fiduciary duty to the Trust under ERISA by failing to disclose that the Falkenstein, Kern and Bergin notes were unsuitable investments for the Trust, which disclosure would have revealed Mr. Parks' misrepresentations and allowed the Trust to avoid or mitigate its loss.

G. That the plaintiffs are entitled to judgment against the defendants in the total sum of $142,745.71, plus costs, interest and reasonable attorney fees.

Appendix A

Plaintiffs' counsel may prepare a proposed final judgment form in conformity herewith for the signature of the court.

DATED at Anchorage, Alaska, this 29th day of July, 1992.

s/ illegible
United States District Judge

CC: R. BLISS
H. Gazaway

APPENDIX B — MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED FEBRUARY 21, 1996

MINUTES OF THE UNITED STATES DISTRICT COURT DISTRICT OF ALASKA

Buster v. Greisen, et al.
Case No. A94-0475 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management: 271-3235*

PROCEEDINGS: **ORDER FROM CHAMBERS**

Defendants Ronald E. Greisen, Henry P. Head, and David L. Ratchye (collectively called "Head") seek attorney's fees from Plaintiff Jack B. Buster ("Buster") and Buster's attorney, A. Lee Petersen, after successfully defending a lawsuit brought by Petersen against them on Buster's behalf. Docket Nos. 72 & 76. The motion is opposed. Docket No. 75. The parties have thoroughly briefed their respective positions and oral argument would not be helpful. Thus, the matter will be decided on this record. D. AK. LR 7.1(i), *United States v. Cheely*, 814 F. Supp. 1430, 1436 n.4 (D. Alaska 1992) (discussing the circumstances under which oral argument is allowed in this Court under a predecessor essentially identical rule).

Jurisdiction in this case is based upon federal questions related to the federal Employee Retirement Income Security Act ("ERISA"). *See* 29 U.S.C. § 1132(e) and § 1451(c) and 28 U.S.C. § 1331.[1] To understand the context in which the motion for

1. Buster has been found to be a fiduciary under an ERISA plan, (Cont'd)

attorney's fees arose and the basis for this Court's jurisdiction, it is necessary to review this case's procedural history. Buster was a fiduciary for an ERISA plan operated by Head as trustee for the employees of a C.P.A. firm, Thomas, Head & Greisen. Head successfully sued Buster for breach of his fiduciary duties to the plan in this Court. *See Thomas, Head & Greisen Employees Trust v. Buster,* 24 F.3d 1114 (9th Cir. 1994). Thereafter, Buster brought this action for misrepresentation in state court against Head arguing that Head had, in effect, made misrepresentations by omission. Buster argued that Head had not warned Buster that, in Head's view, Buster was an ERISA plan fiduciary who therefore could become liable to the plan for fraud under a heightened standard of care. Because failure to disclose opinions about the law would not qualify as misrepresentations, it is clear that Buster was, in effect, pleading a claim for civil entrapment, malicious prosecution, or abuse of process. This analysis is made more clear by review of the damages claimed which were, in essence, directly related to Buster's being sued by Head and losing the prior lawsuit. Head removed this action to this Court, arguing that it was an action by a plan fiduciary to determine the scope of his fiduciary responsibilities and obtain contribution from his co-fiduciaries for the damages he is obligated to pay the trust. *See* 29 U.S.C. § 1132(e) (giving this Court exclusive jurisdiction over actions

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(Cont'd)

Thomas, Head & Greisen, 24 F.3d at 1116-20, and, in this action, seeks to relitigate his responsibilities to the plan, its trustees, and the other fiduciaries based on his contention that he was fraudulently led into becoming a fiduciary to the plan. This is clearly an action contemplated by ERISA. *See* 29 U.S.C. § 1451 (permitting an action by a fiduciary who is adversely affected by the act or omission of any party under the subtitle, *i.e.*, another fiduciary with respect to a plan for legal or equitable relief). Buster is suing for an omission to warn him about his fiduciary responsibilities to the plan. 29 U.S.C. § 1451(a)(1).

by fiduciaries regarding their duties to plans, participants and trustees); *see also* 29 U.S.C. § 1109 (providing for liability for breach of a fiduciary duty). This Court recognized that the question was close and that the United States Supreme Court had specifically denied federal courts removal jurisdiction over actions for abuse of process brought in state court where the allegedly abusive process originated in federal court. *See Wheeldin v. Wheeler,* 373 U.S. 647, 652 (1963). Nevertheless, this Court denied Buster's motion to remand, finding that his action, if permitted, would be so chilling on the exercise of federal rights granted by ERISA that an exercise of jurisdiction by this Court was necessary to protect its judgments and allow litigants the protection intended by ERISA. *See* order at Docket No. 13 which was affirmed on reconsideration at Docket No. 25. This Court found that the assertion of jurisdiction was necessary "to enable [the] [C]ourt to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1676 (1994).

The case was referred to Magistrate Judge John Roberts who was administering Head's efforts to collect the judgment previously awarded against Buster. The parties filed cross-motions for summary judgment. Magistrate Judge Roberts reviewed the record, heard oral argument, and recommended that judgment be entered in favor of Head and against Buster. In Magistrate Judge Roberts' reports and recommendations, he concluded that Buster had not stated a claim against Head for misrepresentation under Alaska law and that this action was a disingenuous attempt to circumvent the Ninth Circuit's decision in this case and harass Head for successfully suing Buster in the prior action. Docket Nos. 61 & 65. After a *de novo* review of the record and the exercise of its independent judgment, this

Court agreed with Magistrate Judge Roberts and entered an order granting Head summary judgment. Docket No. 66. This Court found that Buster's action was barred by the doctrines of *res judicata* and collateral estoppel, because Buster's theory of civil entrapment would have been a compulsory counterclaim or an affirmative defense in the prior action.[2] Judgment was therefore entered in favor of Head and against Buster, and Head was awarded costs of action Docket No. 67.

This Court has reviewed the motion for attorney's fees at Docket No. 72 and finds that the hours worked and the fees charged are reasonable for comparable actions by men and women of comparable skill, education, and experience in this District. This Court therefore is prepared to award the sum requested: $29,244.00 against Buster. *See* 29 U.S.C. § 1451(e). Head also argues that the award should be made as a sanction against Buster and Petersen for bringing a patently frivolous action, in bad faith, solely for the purpose of harassing the Defendants and disrupting their reasonable efforts to collect the judgment previously awarded against Buster. *See* 28 U.S.C.

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2. Magistrate Judge Roberts' invocation of *res judicata* and collateral estoppel, which was clearly correct on this record, suggests an alternate basis for jurisdiction; this Court's power to enjoin state court actions in which litigants seek to relitigate matters resolved against them in federal court. *See, e.g., Western Sys., Inc. v. Ulloa,* 958 F.2d 864 (9th Cir 1992); *Amwest Mortgage Corp. v. Grady,* 925 F.2d 1162 (9th Cir. 1991). Alaska would not require mutuality of estoppel where the party against whom estoppel is urged had a full and fair opportunity to litigate the issues in the prior proceeding. *Pennington v. Snow,* 471 P.2d 370 (Alaska 1970). Buster thoroughly litigated the issues which doom this action in the proceeding before Judge von der Heydt and therefore is bound by all factual determinations made in this case: he was a fiduciary, he breached his fiduciary duty, he is liable to the plan, and he is not entitled to contribution from the other fiduciaries.

Appendix B

§ 1927, FED. R. CIV. PROC. 11, D. AK. LR 1.3; *see also Cox v. Nasche,* 149 F.R.D. 190 (D. Alaska 1993) (discussing an award of attorney's fees against an attorney who litigated in bad faith).

Petersen should be jointly and severally liable for the attorney's fees to be awarded in this action. The motion gave him notice of the application, and he has made his defense. *See* Petersen's affidavit accompanying Buster's opposition at Docket No. 75; *see also* Docket No. 75 at 11.[3] This Court agrees with Magistrate Judge Roberts that Petersen has been disingenuous in his published remarks in this case. The only possible explanation for this lawsuit and Petersen's conduct is that he brought this patently frivolous case, in bad faith, solely for purposes of harassment. Petersen is not a new attorney. He is a former deputy United States Attorney who has practiced in this Court for many years. There is simply no excuse for his actions in this case. *See Cox,* 149 F.R.D. at 197-98. None of the possible excuses noted in *Cox* could possibly apply in this case. Petersen should share in liability for the judgment for fees rendered in this case. In *Cox,* this Court discussed in detail why it believes an award of attorney's fees is the appropriate measure of sanctions where an action or motion is brought in bad faith purely for purposes of harassment and to force an opponent to suffer economic waste by incurring unnecessary attorney's fees, because the fees incurred are a proper measure of the damage suffered.

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3. Because the motion notified Petersen that fees were sought against him as well as his client, he has received the hearing contemplated by *Ulloa,* 958 F.2d at 873.

APPENDIX C — MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED MARCH 27, 1996

MINUTES OF THE UNITED STATES DISTRICT COURT DISTRICT COURT DISTRICT OF ALASKA

Jack Buster v. Ronald Greisen, et al.
Case No. A94-0475 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management: 271-3235*

PROCEEDINGS: **ORDER FROM CHAMBERS**

Ronald Greisen and others (collectively called "Greisen") sued Jack Buster ("Buster") for fraudulent breach of fiduciary duties in connection with a pension trust and obtained a judgment which was affirmed on appeal. *See Thomas, Head & Greisen Employees Trust v. Buster,* 24 F.3d 1114 (9th Cir. 1994). Thereafter, Buster brought this action in state court alleging misrepresentation against Greisen. Greisen removed this action to this Court where, after extensive briefing by the parties, summary judgment was entered in favor of Greisen. Docket No. 66. Thereafter, the Court granted a motion by the defendants requiring Buster and his attorney, A. Lee Petersen ("Petersen"), to pay Defendants' attorney's fees incurred in the defense of this action. This Court expressly concluded that this action had been brought in bad faith purely for purposes of harassment. Docket No. 78.[1] Defendants thereafter sought to collect their

1. In its order, this Court referenced 28 U.S.C § 1927 as authority for sanctions. This is problematical. This case was frivolous and in bad faith from its inception. The Ninth Circuit has held that § 1927 cannot be (Cont'd)

judgment from Petersen and scheduled a judgment debtor examination for that purpose. *See* Docket No. 86. On the recommendation of Magistrate Judge Roberts, this Court authorized the entry of a restraining order that was directed to Petersen and the professional corporation through which he conducts his legal practice. *Id.*

Petersen has filed a motion to vacate and/or modify the judgment debtor proceedings, to vacate and/or modify the restraining order, and to impose FED. R. CIV. P. 11 sanctions. Docket No. 87. It appears that the motion should be heard on shortened notice in order to provide the parties with guidance at the upcoming hearing.

(Cont'd)
used to sanction for *commencing* a frivolous law suit but only for *maintaining* one. *See In re Keegan Management, Co.*, No. 94-15713, 94-16135, 1996 WL 81123 (9th Cir. 1996), *see also Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *Matter of Yagman*, 796 F.2d 1165, 1187 (9th Cir.) ("Section 1927 does not apply to initial pleadings, since it addresses only the multiplication of proceedings. It is only possible to multiply or prolong proceedings after the complaint is filed."), *amended*, 803 F.2d 1085 (9th Cir.1986), *cert. denied*, 484 U.S. 963 (1987). While it could be argued that Petersen continued to maintain this lawsuit even after its frivolousness should have become apparent, it is not clear that such a finding would satisfy the case law. It is not necessary to consider this issue further, however, because FED. R. CIV. P. 11 and this Court's inherent authority suffice for sanctions where, as here, the action is not only frivolous but is brought in bad faith. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (court has inherent powers necessary to conduct business; including the power to sanction); *see also Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988) *cert. denied*, 493 U.S. 1035 (1990); *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993) (quoting *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir 1986)); *accord Zambrano v. City of Tustin*, 885 F.2d 1473, 1478 (9th Cir. 1989).

Appendix C

Petersen argues that attempting to discover information about his corporation's assets and liabilities based on a personal debt involves harassment. It is not clear to what extent Petersen's corporation is liable for his bad faith actions in connection with litigation. *See* FED. R. CIV. P. 11(c) and AS 10.45.010, *et seq.* That issue should be briefed and argued at the judgment debtor proceeding because it will affect the proceeding's scope. Because it appears that Petersen is a sole practitioner, it is at least debatable that he and his corporation are alter egos for purposes of FED. R. CIV. P. 11 sanctions. Petersen is certainly the corporation's agent. This Court expresses no opinion on how that debate should be resolved because it is a matter committed, in the first instance, to Magistrate Judge Roberts.[2]

Petersen correctly points out that FED. R. CIV. P. 69 adopts state law regarding the collection of judgments. State law is set out in Alaska Rule of Civil Procedure 69. Any AK R. CIV. P. 69(c) restraining order should be entered during the pendency of the proceedings. Petersen argues that this means only until the judgment debtor examination. Where as here, a Magistrate Judge will hold the initial hearing but the parties will have the opportunity to seek review of any adverse decision before this Court, the restraining order should remain in effect until a few days after the judgment debtor proceeding is completed to enable such review. *See* U.S. DIST. COURT LOCAL MAGISTRATE

2. FED. R. CIV. P. 11 sanctions are only available where a party or its attorney engages in litigation strategy that is frivolous or in bad faith. If a strategy is debatable, it is not sanctionable. My conclusion that the Petersen's professional corporation may be liable for his bad faith actions on an agency or alter ego theory should not be taken as expressing an opinion on those issues. It is certainly possible that all of Petersen's assets and the corporations assets are exempt from execution on one or more theories. That is what the judgment debtor proceedings are intended to determine.

RULES 1(15) and 12.[3] It would appear that the specific procedures in AK R. CIV. P. 69 would take precedence over the more general procedures in FED. R. CIV. P. 65(b). In any event, the order was issued by Judge Sedwick of this Court at my request on March 21, 1996 and the tenth day[4] thereafter is Sunday, March 31, 1996. The hearing in this case is scheduled for the following day, April 1, 1996, and Judge Roberts can determine at that time, after hearing from the parties, whether the stay should remain in effect or be terminated.

IT IS THEREFORE: ORDERED:

The motion for FED. R. CIV. P. 11 sanctions at **Docket No. 87** is **DENIED**.

The motion to vacate and/or modify the restraining order and the order for judgment debtor to appear at **Docket No. 87** is **GRANTED IN PART AND DENIED IN PART**. Specifically, the request to vacate the judgment debtor examination and the accompanying restraining order is **DENIED**. The request to modify this Court's restraining order, however, is **GRANTED**. Therefore, the restraining order at Docket No. 86 is modified to limit the duration of the order to the time up to and including

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3. This Court assumes that Judge Roberts will determine on the record at the completion of the judgment debtor proceedings whether the restraining order should remain in effect, be modified, or be vacated. A person aggrieved by his decision can seek to avoid the time limits in U.S. DIST. COURT MAGISTRATE LOCAL RULE 12 by seeking a hearing on shortened time or an abbreviated hearing schedule. *See* D. AK. LR 7.1(k). Such an application should first be made to Judge Roberts. *Compare* FED. R. CIV. P. 62 *with* FED. R. APP. P. 8.

4. *See* FED. R. CIV. P. 65(b).

April 1, 1996, and such additional time as is necessary to complete the judgment debtor proceeding scheduled for that day and to allow the parties their respective rights under U.S. DISTRICT COURT MAGISTRATE LOCAL RULE 12.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: *March 27, 1996* SECRETARY'S INITIALS: *ab*
* ALL INQUIRES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER. Any request for other information or for clarification, modification, or reconsideration of this Order, or for extension of time must be made in the form of a motion. *See* FED. R. CIV. P. 7(b)(1); D. AK. LR 7.1(1). No one should telephone, fax or write to chambers regarding pending cases. The judge's secretary and law clerks are not permitted to discuss any aspect of this case, provide any information or communicate with any person including litigants, lawyers, witnesses and the general public regarding cases.